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In The

Supreme Court of the United States

October Term, 1997

BETH ANN FARAGHER,

Petitioner,

vs.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Is an employer, pursuant to common-law principles of agency, responsible for hostile-environment sexual harassment committed by supervisory employees who use their supervisory status to effectuate the harassment?

II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment:

A. through actual notice to an intermediate supervisor, who reports it no further?

B. from the same pervasive nature of the harassment that makes it actionable?

C. by default through its failure to effectively disseminate any sexual harassment policy and instructions about how and to whom victims should complain?

LIST OF PARTIES

The parties to the proceedings in the Court whose judgment is sought to be reviewed here include those who appear in the caption of the case, as well as Nancy Ewanchew, who was a co-plaintiff, and Bill Terry and David Silverman, who were co-defendants with the City of Boca Raton. There is no parent or subsidiary of any party to be listed.

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OPINIONS BELOW

The opinions of the Court of appeals are reported at 76 F.3d 1155 (11th Cir. 1996) and 111 F.3d 1530 (11th Cir. 1997) (*en banc*) and are reproduced in the Appendix filed with the Petition for Certiorari ("App.") at 41a and 1a. The opinion of the district court is reported at 864 F. Supp. 1552 (S.D. Fla. 1994) and is reproduced at App. 69a.

STATEMENT OF JURISDICTION

The first decision of the United States Court of Appeals for the Eleventh Circuit was rendered on February 8, 1996, and was vacated May 13, 1996, 83 F.3d 1346 (11th Cir. 1996). The *en banc* Court of appeals decision was rendered April 15, 1997 and amended April 28, 1997.

The Court, through Justice Kennedy, on July 9, 1997, granted petitioner an extension of time until and including August 13, 1997, within which to file her petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . . .

STATEMENT OF THE CASE

Beth Ann Faragher in 1992 sued the City of Boca Raton and two of its lifeguard supervisors for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. The district court, following a five-day bench trial, found for Faragher on her Title VII claim, although rejecting similar state law claims against Respondent.[1]

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[1] Faragher and Nancy Ewanchew, another lifeguard, also sued Bill Terry and David Silverman, the two supervisors, for sexual harassment under 42 U.S.C. § 1983 (Counts II and III), and asserted pendent state law claims for battery against Terry (Counts IV and V) and for negligent retention and supervision against the City (Counts VI and VII).

(continued...)

The district court analyzed the Respondent's Title VII liability for the conduct of Terry and Silverman under three distinct theories: constructive knowledge, actual knowledge and use of authority. It found the City liable on three bases: (1) Respondent had constructive knowledge of Terry and Silverman's conduct because it was so pervasive, App. 92a; (2) Terry and Silverman acted as agents of the Respondent when they harassed Faragher, so the Respondent was liable regardless of actual or constructive knowledge, App. 93a; and, (3) another lifeguard captain, who was also an agent of the Respondent, had actual knowledge. *Id.*

A divided (7-5) *en banc* Court of Appeals for the Eleventh Circuit accepted the district court's factual findings but found no liability. The majority rejected all three theories advanced by the district court. It found that Terry and Silverman did not use their authority in harassing Faragher and that the City had neither actual nor constructive notice of the harassment. App. 7a-18a.[2]

This Court granted certiorari on November 14, 1997.

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[1](...continued)
The district court awarded Faragher $1 in nominal damages on her Title VII claim against Respondent, $10,000 in compensatory damages on her § 1983 claim against Terry and Silverman, jointly and severally, and $500 in punitive damages on her battery claim against Terry. Additionally, the district court entered judgment for Ewanchew on her battery claim against Terry and awarded her $35,000 in compensatory damages and $2,000 in punitive damages.

[2] The Court of appeals did not address the district court's denial of Faragher's state law negligence claim.

STATEMENT OF THE FACTS

The Sexually Hostile Work Environment

During the time that Petitioner worked her way through college from September 1985 through May 1990 as a lifeguard for Respondent, the environment in which she and the other women lifeguards worked was so pervasively abusive that the original court of appeals panel dismissed the Respondent's protestations to the contrary by observing that it "might have been clear error for the District Court, having credited Faragher's testimony, to find otherwise." App. 54a.

Bill Terry, the Marine Safety Chief, was a hands-on manager who, the district court found, "had a propensity to touch female employees on various parts of their anatomies, including the waist, neck, and buttocks . . . ." App. 73a, ¶ 15. He rubbed Faragher's thigh, put his arm around her and touched her buttocks between 15 and 30 times. Joint Appendix ("J.A.") 186-87.

David Silverman, a lifeguard lieutenant and later a captain, pantomimed cunnilingus outside Marine Safety Headquarters, J.A. 114, in front of Faragher and six to twelve other persons, J.A. 189-90. He tackled a fleeing Faragher on one occasion, and on another hefted her over his shoulder to carry her as he ran along a boardwalk. J.A. 176-77. Lieutenant Silverman invited Faragher to shower with him, J.A. 178-77, and pounded on the door to the showers in the unisex locker room (demanding to join the women who were bathing), J.A. 112, 178-77, prompting, as lifeguard Nancy Ewanchew recalled, "a lot of girls to go in the shower at the same time because we were afraid that one of these days that door was going to open and we didn't know what was going to happen." J.A.

112. Lieutenant Silverman also invited Faragher to spend rainy days in his truck, J.A. 180-81, the context for which invitation was Silverman's parody of a weather prediction: a rain forecast meant "a 40 per cent chance I'm going to get a blow job today." J.A. 111, 180. Silverman attempted (unsuccessfully) to kiss Faragher on the one time (out of the many that he asked) she went out with him for a beer. J.A. 172-73.

Both Chief Terry and Lieutenant Silverman disparaged and demeaned women, of whom they spoke about largely in terms of body parts. Terry critiqued Faragher's breasts ("she was man like and . . . she didn't have a chest"), J.A. 106, and those of Elizabeth Leen ("[W]hen God was handing out tits, [Elizabeth Leen] was at the head of the line.") J.A. 105. Lieutenant Silverman likewise commented at Marine Safety headquarters about the size and firmness of Faragher's breasts, voiced approval of her "nice ass" as she walked up the stairs to headquarters, J.A. 175, and shared with Faragher his "nice tits" assessments of beach patrons as he sat with her in her beach tower. J.A. 183. Lieutenant Silverman, in conversations with Faragher, would count the number of women assigned to his command as a lieutenant by saying he had twice that many "tits" on his beach that day. J.A. 110, 184.

Beyond Lieutenant Silverman's outdoor pantomime and his group-directed demands to join women in the shower, Chief Terry and Lieutenant Silverman also sexually harassed, on an individual basis, the other four to six women lifeguards (out of a total lifeguard corps of 40 to 50) who worked there at any one time. *See* App. 72a, ¶9. Chief Terry, Ewanchew recalled at trial, "would touch you and put his hands on you and reach towards you, your breast in a crowded room right

behind people that were standing there, he would reach around and laugh . . . ." J.A. 102. In what the district court found to be "a particularly egregious incident," Terry "pressed himself against [Nancy] Ewanchew's buttocks and moved his hips simulating sexual movement." App. 74a, ¶ 17.

With Kelly Evans, Chief Terry "would . . . grab her on the shoulder and pull her in real close and put his hand around her waist and grab her butt." J.A. 107. He put his arm around Gail Nye's shoulders and hips a half-dozen times,[3] grabbed Beverly Barta on the buttocks twice, J.A. 200, and slapped Victoria Bonner on the thigh as she was punching out her time card. J.A. 156. Jamie Harrington, whom Terry "touched and grabbed all the time," J.A. 107 once punched Terry for putting his hand on her thigh. J.A. 130-131.

Silverman, meanwhile, told an appalled Gail Nye during her first day on the job, "I want to lick your clit," R. 23:114, J.A. 140; informed Harrington, "It must be cold out because [her] nipples were showing," J.A. 127; solicited Leen, within earshot of Barta, to give him "a blow job" in his truck, J.A. 182, 201; and observed to Harrington as a beach patron passed the tower they shared that day that he would "love to eat between her legs." J.A. 129.

Terry used similarly inappropriate language to

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[3] The trial was held from June 21 to 27, 1994. Because the court reporters did not assign consecutive volume numbers, we refer to the date in June for each volume. Any quoted material that is not part of the Joint Appendix, therefore, will be cited as Record ("R."), the day in June, 1994 the testimony was given and finally the page number. This section, for example, would be cited as R. 23:116-17 which refers to pages 116-117 of the transcript of June 23, 1994.

other women. He referred to female lifeguards as "cunts and sluts and bitches," J.A. 102, and told Ewanchew: "Men just don't marry a girl like you." J.A. 100. The "cunt" epithet was a favorite — one that Terry modified with "stupid" to describe Bonner to Harrington one day when Bonner forgot her radio, J.A. 125, and to refer to Bonner on another day in front of her lieutenant, J.A. 156; one (along with "bitch") that Terry used to describe a woman on another team at a lifeguard competition. J.A. 103-04. Terry asked Jamie Harrington if she had sex with a reporter who did a story about her. J.A. 130. When Bonner interviewed for her job, Terry inquired: "So, are you going to [have sex with] all the guys like the rest of the girls?" J.A. 154. Silverman, who was a lieutenant would sit with Ewanchew in her tower, regaled his supervisee with "disgusting" stories, J.A. 114, including, for example, one about having sex with a drunken beach patron while another lifeguard watched. J.A. 111.

Ewanchew, who worked as a Boca Raton lifeguard from April 1987 through April 1989, wrote to Richard Bender, the City's director of personnel and labor relations on April 23, 1990 (a year and a day after she had quit, and shortly after she had passed a probationary period at a new job), J.A. 119-20, and Defense Exhibit K, complaining of "extreme cases of sexual and verbal harassment going on at the City of Boca Raton's Beach Patrol," and naming Chief Terry and (by now) Captain Silverman as the perpetrators. Bender met with Ewanchew May 17, 1990, conferred with Terry June 5, 1990 and on June 18, 1990 interviewed five female employees, including Faragher. On June 26, 1990, Bender reported to the city manager that, *inter alia*: "All [the women] cited experiences of inappropriate language from Terry and Silverman. All indicated experiences of unsolicited touching by Terry . . . All of the women

indicated that these actions made them uncomfortable. . . ." R. 23:56. The City then reprimanded both and required Chief Terry and Captain Silverman to forfeit 160 and 40 hours of annual leave, respectively. App. 81a.

The district court concluded that Terry and Silverman's conduct was "sufficiently severe or pervasive to alter the conditions of Faragher's employment," and went on to hold that "[t]his finding of pervasiveness supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment. . . ." App. 92a.

The Supervisory Structure

During the time of Faragher's employment with the City, the reporting hierarchy within the Marine Safety Section was as follows: ocean lifeguards reported to Marine Safety Lieutenants, who reported to Marine Safety Captains, who reported to Terry, the Chief of the Marine Safety Section. App. 71a, ¶5. Terry was the highest ranking official at Marine Safety Headquarters. R. 24 at 173. Terry reported directly to the Recreation Superintendent, who reported to the Director of Parks and Recreation, who, in turn, reported to the City Manager. App. 71a, ¶¶5, 8. The district court found a clear chain of command in the Marine Safety Division, which vested in the Marine Safety supervisors both administrative and disciplinary authority over the lifeguards. App. 92a-93a.

Reporting to Terry were two operational captains, one training captain, six lieutenants, approximately sixteen full time and thirty-two part time lifeguards. R. 23:189. The district court specifically found that both Marine Safety Lieutenants and Marine Safety Captains

acted in a supervisory capacity *vis-a-vis* the ocean lifeguards. In particular, the court found Chief Terry, Lieutenant Silverman, and Training Captain Robert (Flash) Gordon to be supervisors of the ocean lifeguards. App. 71a, ¶6.

The district court found that, as Marine Safety Chief, Terry had the authority to supervise all aspects of the lifeguards' work assignments, to conduct counseling, to issue oral reprimands and to place reports of such disciplinary actions in the lifeguards' personnel files. App. 92a. Chief Terry also interviewed and selected new lifeguards, subject to approval by higher management. R. 23:36, 65. No one, during the twenty years that Terry was Marine Safety Chief, was hired without his recommendation. *Id.* at 36; R. 24:173. Chief Terry initiated firing and suspending personnel. R. 23:38; R. 24:173. Terry's evaluations of the lifeguards translated into salary increases. R. 23:39, 65. Terry made recommendations regarding promotions to lieutenant and captain. *Id.* at 44-45.

Lifeguard captains, according to Captain Richard Morrison, would help Terry complete evaluations and scheduling, would make sure lifeguards were in their towers with the correct equipment, would conduct morning meetings and training and were more or less overseers or foremen. R. 23:182.

The district court found that, as Lieutenant and later, as Captain, Silverman had supervisory responsibility over the lifeguards' daily duties, including designation of the lifeguards' work assignments, staffing of shifts and supervision of their physical fitness routines. App. 92a. Lieutenants made supervisory and disciplinary decisions and had input on the evaluations as well. J.A. 109. In

1989, Terry sent the lifeguards a memo telling them that Lieutenants were their immediate supervisors in the chain of command. J.A. 171-72. Lieutenants could write lifeguards up for discipline, as Faragher understood it. *Id.* Silverman underscored his authority when he told Ewanchew, in the course of supervising her in her tower, "[Y]ou will be making the rescue because I'm your boss." J.A. 109.

Despite the formal hierarchy, the district court found that the lifeguards' contacts with higher city officials, such as the recreation superintendent, were almost non-existent. App. at 93a. The Beach Patrol was far removed from downtown, and was run by Chief Terry without a high degree of accountability to the City. R. 23:178-79. According to Captain Morrison, one of the City's witnesses, Terry "was pretty much given to do what he wanted to do." *Id.* at 179. Captain Morrison also agreed that "Terry was more or less the law east of A-1-A," the highway that separates the beach from the rest of the City. *Id.* at 178. Lorraine Gardner, the recreation superintendent from 1974 until 1988, and Terry's direct boss, acknowledged that "Terry pretty much ran the show down at the beach patrol." *Id.* at 161. Ewanchew for example, witnessed a lifeguard who angered Terry — the lifeguard had become upset about the way in which Terry had spoken to the lifeguard's wife — be banished to bad towers (those without proper sun protection or missing a windscreen) and to a shift that the lifeguard did not want. J.A. 118-19.

Complaints to Captain Gordon

Robert (Flash) Gordon was a City lifeguard from 1981 to 1990, and became a Lieutenant and a Captain and training officer in the late 1980s. R. 21:152. In addition

to performing regular supervisory duties, Gordon often ran the morning workouts for the lifeguards. J.A. 152. According to Gordon, "practically all" of the women lifeguards who worked at the beach, including Faragher, Ewanchew, Harrington, and Nye, complained to him about sexually inappropriate "language and actions" by Terry and Silverman. *Id.* at 139-40. In addition, according to Ewanchew, Gordon "definitely saw and heard" sexual harassing incidents involving Terry and Silverman. J.A. 116.

Faragher specifically told Gordon about the time that Silverman tackled her after the morning workout, following it up with comments about her having "nice legs and ass but really no chest to speak of." J.A. 150-51. Nye told Gordon that as she sat in a tower with Lieutenant Silverman, he "invited her at lunch time to go back to his truck so that he could lick her clit." J.A. 140, 232. Nye also told Gordon that Lieutenant Silverman had called her a "cunt." J.A. 232. Leen complained to Gordon about Lieutenant Silverman's comments about her breast size and references to her "tits." J.A. 145. Ewanchew complained to Gordon about unwanted touching and verbal harassment. J.A. 144-45. Ewanchew told him that conduct from both Lieutenant Silverman and Chief Terry was "very offensive" to her and that she "wanted him to see if he could do something about it or try to stop it or tell them to stop it. And [she] asked him what [she] should do." J.A. 115.

Captain Gordon, upon hearing these complaints, discouraged each of the women from pursuing the matters further. He "advised them that in the past there have been times when going to City Hall wasn't as productive as we had hoped it would be." J.A. 146. Gordon also told the women to be careful about going to City Hall. J.A.

146. Ewanchew recalls Gordon responding "that the City didn't care" and "basically just to stick it out." J.A. 115. After she complained twice more to Gordon, he said, "I can't do anything, I'm powerless, . . . the City doesn't care and . . . there is nothing that can be done, . . . just stick it out." *Id.* Ewanchew overheard Gordon telling Faragher and Harrington the same thing when they complained to him, including stating "there [was] nothing he could do." J.A. 117.

Gordon's Responsibility to Report Sexual Harassment

In sharp contrast to Gordon's "stone wall" response to Faragher and the other female lifeguards, city officials testified that supervisors like Gordon had a responsibility to report sexual harassment or any inappropriate behavior up the chain of command. J.A. 227. Richard Bender, Director of Personnel and Labor Relations during the time of Faragher's employment, explained, "if a supervisor observes . . . sexual harassment or anything else that is inappropriate to the workplace, then . . . it's incumbent on that supervisor to report it to either me or someone else within the chain of command of the department or someone else in the City with the position of authority." *Id.*[4]

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[4] Bender also stated that "it is any employee's job who observes inappropriate behavior to bring it to the attention of their supervisor." R. 24:34. Gordon gave conflicting testimony about whether he understood that he had the authority to discipline and counsel Silverman. On the one hand, he acknowledged that he had tried to counsel Silverman in the past and had gone to city officials with problems about Silverman. R. 22: 9-13. On the other hand, he suggested that he did not know he had the authority "to record card or discipline a supervisor." J.A. 143.

Nevertheless, Gordon failed to report Faragher's and the other lifeguards' complaints to city officials. Gordon never informed the City Director of Personnel and Labor Relations or the Recreation Superintendent, Terry's immediate supervisor, that he was aware of sexual harassment. J.A. 227; R. 22:14-15. Indeed, the City never provided any training to Marine Safety Division supervisors on how to deal with complaints regarding sexual harassment by supervisors. Gordon testified that the City "never told [him] anything" about what to do if women employees complained to him about groping and bad language. J.A. 143.

The City's Sexual Harassment Policy

Prior to April 1990, the City had taken only one action regarding sexual harassment in its workforce — it had issued a single, written statement regarding sexual harassment dated February 26, 1986. J.A. 267. That statement, however, was not widely disseminated. The district court found

> a complete failure on the part of the City to disseminate said policy among Marine Safety Section employees. Neither Terry nor Silverman were ever told or made aware of the City's sexual harassment policy prior to Bender's [June 1990] investigation of Ewanchew's charges. Ewanchew herself never got a copy of the sexual harassment policy during her tenure with the City.

App. 83a. Based on this, the district court found the City "did not discharge its duty under the EEOC guidelines regarding the maintenance of an effective sexual

harassment policy." App. 83a, ¶52.[5]

Bender did not know if the 1986 policy had been posted at Marine Safety headquarters. R. 24:29. Terry "really [didn't] know" if he had ever received it. R. 23:34. The first time anyone in the City ever communicated anything about sexual harassment to Terry during his twenty-three year tenure was after Ewanchew's spring 1990 complaint to Bender. J.A. 257. Lieutenant Silverman did not recall ever hearing the term "sexual harassment" or being informed about any policy against it before spring 1990. *Id.* Captain Gordon had "never heard the word" sexual harassment until the investigation of Ewanchew's complaint in 1990. J.A. 141.[6] Lorraine Gardner, the Recreation Superintendent and Terry's boss from 1974 through her retirement in 1988, knew that there were laws against sex discrimination, but was unfamiliar with Title VII of the Civil Rights of 1964, and did not feel that it was her job to do anything to make sure

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[5] 29 C.F.R. 1604.11(f), of which the trial court took judicial notice, R. 23:55, provides as follows:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

[6] In terms of imparting other skills and information and ensuring City-wide standards, however, Captain Gordon recalled that the City ensured that its lifeguards knew how to swim and to perform other necessary tasks, *id.* at 141-42, explained the City's insurance program to employees, *id.*, and sent out pamphlets about the City retirement fund. *Id.*

that people who worked for her did not engage in sexual discrimination or sexual harassment; she testified that "I personally didn't feel I had to do anything unless it was brought to my attention." J.A. 243.

The City similarly failed to notify non-supervisory employees of the sexual harassment policy. Faragher saw the sexual harassment policy for the first time after Ewanchew's spring 1990 complaint. According to Faragher, "[t]he City's policy kind of appeared after [Ewanchew's] letter was written." J.A. 188. Ewanchew did not recall the City ever telling her about the policy, affirmatively raising the subject of sexual harassment, expressing strong disapproval of sexual harassment or informing employees of their right to raise and how to raise the issue of harassment. J.A. 120-21. No one said anything to Bonner during the approximately three years that she worked there about her rights relating to sexual harassment. J.A. 157.

In addition to the gaps in distribution, the City's 1986 sexual harassment policy contained no reporting mechanism. P. Ex. 2; J.A. 267.[7] Thus, even if they had seen the policy, Faragher and the other lifeguards would have had no way of knowing how and to whom they could

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[7] The City on May 7, 1990, through a memorandum to "all department heads," issued a revised sexual harassment policy that it requested its supervisors to review and to post. Plaintiff's Exhibit 5(b), J.A. 269. The revision, according to Bender, had nothing to do with Ewanchew's complaint. J.A. 253-54. The revised policy urged any employee who feels he or she has been sexually harassed to report immediately to his or her supervisor, department or division head, or the personnel and labor relations director, ensures confidentiality, and promises protection "from coercion, intimidation, retaliation, interference or discrimination for filing a complaint or assisting in an investigation." J.A. 258.

complain.[8] See App. 84a, ¶53.[9] Alternative avenues also were not available. The employee handbook[10] simply directed employees with complaints or grievances to see their supervisors. P. Ex. 1; J.A. 274.[11] Yet Ewanchew did not know who Terry's boss was, or the names of other City officials; she testified that "we were never told the chain of command." R. 21:95. The only other complaint avenue was through collective-bargaining grievance procedures, which were only available to members of the collective bargaining unit. J.A. 225. Part-time employees like Faragher and most of the other female lifeguards had no such rights. R. 23:180; R. 21:25; J.A. 168.

In light of the lack of information and avenues of relief, Faragher and the other women had no way to assess the risks of coming forward. Faragher testified that she did not complain because she feared retaliation. According to Faragher, "I felt like if I did complain, there was probably a good possibility that I would lose my job,"

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[8] Not surprisingly, from 1986 until the receipt of Ewanchew's complaint in spring 1990, no female employee of the City of Boca Raton — which had approximately 1,300 employees, R. 23:187 — ever complained to Bender that a boss had "talked dirty to her" or "groped her." J.A. 257-58.

[9] The district court found that, "[i]n light of the City's lack of dissemination of its sexual harassment policy," Faragher's failure to file a grievance, in and of itself, does not absolve the City from liability. App. 84a, ¶53.

[10] Not until after Ewanchew complained in 1990 did the City address sexual harassment in its employee handbook. J.A. 258.

[11] While it stated, "[y]ou may also wish to speak to your division head or department head, or the Personnel Director," it emphasized that employees first see their supervisors. J.A. 274.

J.A. 187, and "[Chief Terry] had complete authority over me. As a part-time employee, I didn't have any protections. So if he wanted to fire me, it was my understanding that he could fire me." J.A. 169-70. Faragher also testified that "[i]t seem[ed] like Bill Terry could do things that . . . I thought were completely wrong and get away with it, because the City — or the people at City Hall would back him up or support him, and cover it up and just let it be." J.A. 189. Barta did not complain because "[t]hey could fire me at any time for any reason." J.A. 204. Nye also did not complain because she thought she would lose her job. J.A. 331. Likewise, Ewanchew was sure that she would be fired if she complained to City Hall about Chief Terry's conduct. J.A. 118. Ewanchew also feared that Terry would retaliate by giving her a bad recommendation at her new job; thus, she waited for her one year probation at her new position to pass before complaining to Bender. R. 23:208; J.A. 120.[12]

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[12] Ewanchew also feared retaliation from Lieutenant Silverman; she testified that "[Silverman] told me when I was sitting in the tower with him, that I am the boss and I can do what I want to do." J.A. 109.

SUMMARY OF THE ARGUMENT

This Court "decline[d] . . . to issue a definitive rule on employer liability, but . . . agree[d] with the [Equal Employment Opportunity Commission] that Congress wanted courts to look to agency principles for guidance in this area." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986).[13] Among those agency principles applicable to hostile-environment sexual harassment is the one that, "[i]n tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden." Oliver Wendell Holmes, Jr., *Agency*, 4 Harv. L. Rev. 345, 348 (1891). The courts of appeal, however, have diverged on which agency

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[13] Section 219 of the Restatement (Second) of Agency (1958) provides as follows:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

principles to apply and how to apply them.[14]

Petitioner, Beth Ann Faragher, urges this Court to hold that employer liability for hostile-environment sexual harassment by a supervisor arises from one or both of two bases. The first ground for liability is for a supervisor's abuse of his authority, and is contained in § 219(2)(d) of the Restatement (Second) of Agency (1958). The second basis is knowledge, either actual or constructive.

Section 219(2)(d) makes an employer liable for a supervisor's use of his supervisory authority, implicit or explicit, to visit his sexual harassment on those who work for him. Whether the supervisor is abusing that power is a fact-intensive inquiry that necessarily would take into account the nature of the supervisor's powers, the circumstances of the harassment and the proven efficacy of any anti-harassment program.

The knowledge for which Petitioner seeks to hold employers liable is that of three kinds: (1) actual knowledge, through an employee whose job it reasonably should be to report the harassment up the line; (2) constructive knowledge that a fact finder may (but does not have to) infer from the pervasiveness requisite to make the harassment actionable to begin with; or (3)

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[14] *Compare Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir. 1994), *cert. denied*, 512 U.S. 1213 (1994); and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) *with Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, ___U.S. __, 116 S.Ct. 569, 133 L.Ed.2d 493 (1995). *See also Davis v. City of Sioux City*, 115 F.3d 1365, 1372 (8th Cir. 1997)(Arnold, C.J., dissenting) (for a fuller collection of cases on both sides of the issue)

constructive knowledge arising out of an employer's failure to put into place — and to activate, when appropriate — an effective sexual harassment policing mechanism that includes a zero-tolerance policy, an effective and discrete avenue of complaint and remedial action that is both prompt and effective.

Longstanding principles of agency, overlaid on the facts of the case at bar, propel this Court to find liability on each of those grounds. The Court of Appeals for the Eleventh Circuit erred when it created and applied to the instant case liability rules palpably different from the established principles of agency law.[15]

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[15] In the courts below, Petitioner relied on established agency principles as the basis of both her Title VII claims and her state-law claims against the Respondent City. Although the judgment of the court of appeals rejected both the federal and state claims, its opinion discussed only the application of agency law to a Title VII claim. The Court of Appeals for the Eleventh Circuit did not, however, suggest that the agency principles applicable to Petitioner's state-law claims in any way differ from those applicable to a Title VII claim; had that court believed that Florida agency law differed in some way it would presumably have analyzed separately Petitioner's state law claims. The agency principles set out *infra*, are, we urge, equally applicable to the Title VII and the state-law claims in this case.

ARGUMENT

I. AN EMPLOYER, PURSUANT TO COMMON-LAW PRINCIPLES OF AGENCY, IS RESPONSIBLE FOR HOSTILE-ENVIRONMENT SEXUAL HARASSMENT COMMITTED BY SUPERVISORY EMPLOYEES WHO USE THEIR SUPERVISORY STATUS TO EFFECT THE HARASSMENT.

An employer is liable for the sexually hostile environment created by a supervisor under § 219(2)(d) of the Restatement,[16] regardless of whether it knew or should have known of that behavior, if the supervisor was "aided in" perpetrating the harassment by the "existence" of the powers he possesses as a supervisor.[17] In many cases, as here, the supervisor's powers over the terms and conditions of the victim's employment will facilitate that harassment because the victim reasonably believes that she is at risk of retaliation if she resists, objects to or complains about that harassment. We do not contend that employers automatically should be held strictly liable for sexual harassment by supervisors. The dispositive issue under agency principles — whether the supervisor "was aided in accomplishing the [harassment] by the existence of the agency relation" — is obviously a factual question to be addressed in light of the record in each

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[16] The principle embodied in that section is a long standing one. *See County of Macon v. Shores*, 97 U.S. 272, 279 (1877)(county government liable for bonds issued by its county court, even though new administration claimed the prior administration's acts were *ultra vires)*.

[17] Liability can also be found pursuant to § 219(1) in cases in which a supervisor effectuates the offending behavior "within the scope of employment." This issue is discussed in the National Employment Lawyers Association's *amicus curiae* brief.

specific case. Resolution of that question requires the trier of fact to carefully assess, *inter alia*, the nature of the supervisor's powers,[18] the circumstances of the harassment,[19] and the proven efficacy of any anti-harassment program.[20] In most cases,[21] the question of fact will be whether the supervisor was aided in perpetrating the harassment by a reasonable fear on the part of the victim that she would face retaliation if she resisted, objected or complained to others.[22]

The record in this case is a textbook example of agents using what power they had in the circumstances to

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[18] The extent to which a victim's work is under the control of a particular supervisor, and the extent to which the supervisor's actions are constrained by rules unrelated to sexual harassment, would be relevant.

[19] Under one scenario, a more protracted or egregious pattern of harassment would indicate the potency of whatever might be deterring resistance and complaints. Under another, anonymous harassment perpetrated by a supervisor is less likely to be aided by fear of supervisory power, since the victim could not be certain the perpetrator was in fact a supervisor.

[20] The fact that a victim might in the past have complained without resulting retaliation about the actions of supervisors would be evidence that her ability to do so regarding sexual harassment was not impeded by fear of retaliation.

[21] In some cases, the supervisory power utilized may be the supervisor's ability to compel the subordinate to remain in his presence while he makes unwelcome remarks or engages in offensive sexual contacts.

[22] *Karibian v. Columbia University*, 14 F.3d 773,779 (2d Cir. 1994)("Ultimately, the question whether Karibian submitted to Urban's advances out of a reasonable fear of some job-related reprisal is properly one for the finder of fact.")

sexually harass those who work for them. The behavior that Chief Terry and Lieutenant Silverman inflicted on their subordinates through the creation of a hostile environment differed from *quid pro quo* harassment[23] more in degree than in kind: while it was less egregious sexual behavior, it still was an abuse of their supervisory authority.[24] The compliance which the harasser seeks to coerce is not sexual intimacy, but passive if unhappy acceptance by the victim of less intrusive sexual acts and contacts, or of verbal abuse of a sexual nature. The less egregious nature of the sexual activity, however, is by itself of no significance. If the supervisors in this case had threatened to dismiss Petitioner unless she permitted them to touch her buttocks or breasts, or to make crude remarks to her, that would have constituted *quid pro quo* sexual harassment, whether she had obeyed or had been fired for resisting. Hostile work environment cases involving supervisors differ from ordinary *quid pro quo*

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[23] An employer's liability for *quid pro quo* harassment is well established. *See, e.g. Nichols v. Frank*, 42 F.3d 503, 514-14 (9th Cir. 1994); *Karibian v. Columbia University*, 14 F.3d 773, 777-78 (2nd Cir. 1994); *Henson v. City of Dundee*, 682 F.2d 897, 909-910 (11th Cir. 1982); *see also Meritor*, 477 U.S. at 76 (Marshall, J., concurring).

[24] *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 567 (7th Cir. 1997)(Wood, J., concurring and dissenting)("In the real world, sexual harassment does not sort itself into tidy categories. . . . When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross the imaginary line from 'hostile environment' harassment to '*quid pro quo*' harassment. . . . The critical question, for purposes of employer liability, turns on whether the supervisor has abused the powers the employer has entrusted to him; it does not turn on the way in which the supervisor has decided to abuse them.")

cases primarily in the explicitness with which the harassing supervisor exploits his supervisory power over the victim.[25]

Sexual harassment by supervisors is often aided by the same victim fears as those triggered by explicit *quid pro quo* threats, but grounded instead in implicit threats and obvious inherent dangers. As the EEOC has noted, "[a] supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer" which may "force an employee to endure a harassing environment for fear of retaliation." Equal Employment Opportunity Commission Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA), at 405:6697 (March 19, 1990). Supervisors typically exercise broad discretionary powers over their subordinates, determining many of the terms and conditions of their employment, including their raises and prospects for promotion and controlling or greatly influencing whether they are to be dismissed. Supervisors and subordinates alike understand full well that a subordinate who incurs the displeasure of her superior, even for entirely personal reasons, is likely to find her employment made unpleasant, if not terminated altogether.

A supervisor's ability to harass a subordinate is often aided by her legitimate fear that the sort of abrupt rejection which she would unhesitatingly direct at a

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[25] As one court stated, "[i[mplicit quid pro quo harassment is a most serious matter. It is far more likely to take place than is the explicit variety. As time goes by and harassers learn that they can no longer victimize their prey at will, their actions become less overt." *Nichols v. Frank*, 42 F.3d 503, 512 (9th Cir. 1994)

stranger on the street,[26] or perhaps any resistance at all, would incur the wrath of the supervisor and precipitate a retaliatory use of his supervisory powers.[27] Ongoing control over the subordinate's activities and prospects[28] is a daily reminder of the risks that would be incurred by any objection. Sexual harassment is about power — the power of a harassing supervisor to inflict on a female subordinate conduct that he could not impose on any unwilling woman outside of the employment context.[29]

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[26] Outside of the work environment, a woman facing such abusive conduct has available an important arsenal of methods for solving such problems — suitably blunt language, a well deserved slap or the ability to exit quickly. When the harassment happens on the job, however, the victim's ability to protect herself is far more limited. One reason that employers are obligated to protect workers from sexual harassment is that the employer itself requires the victim to remain in the very situation in which the abuse is occurring and in which her own ability to protect herself is severely limited.

[27] *See, e.g. Saxton v. American Tel. & Tel. Co.*, 10 F. 3d 526, 529 n. 4, 532 n. 11 (7th Cir. 1993)(supervisor allegedly retaliated against the victim when she rebuffed his advances).

[28] Any harassment victim who may need a future job reference from the employer in question may well refrain from complaining even just before or after she resigns, for fear that the supervisor in question would retaliate by giving her an adverse reference. *Jansen*, 123 F.3d at 51 (Posner, C.J., concurring).

[29] *Id.* at 497 n.4 (Flaum, J.)("a supervisor, by virtue of his position in a hierarchy, always posses a degree of leverage over a supervisee"); *id.* at 512 (Posner, C.J.)("Even if the supervisor is scrupulous in forbearing to invoke his authority over the employee he is harassing, the existence of that authority is a fact of which the victim is bound to be constantly aware. She is more likely than in the case of a coworker to submit and less likely to complain."); *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1977), *rev'd on other grounds*, 568 F.2d 1044 (3d Cir.

(continued...)

That power arises precisely because such a perpetrator is "aided in accomplishing the [harassment] by the existence of" his powers as a supervisor.[30]

Indeed, the disproportionately large number of sexual harassment incidents involving supervisors[31] reflects this critical aspect of the relationship between supervisors and subordinates. If, in the instant case, had Faragher been the Captain, and Terry and Silverman mere lifeguards, and had Terry and Silverman even briefly engaged in the conduct at issue, Faragher would either have dismissed them on the spot or exiled them to some remote beach where they would never cross her path. The virtual non-existence of cases in which subordinates sexually harass their supervisors reflects the fact that the actual or potential exercise of supervisory powers by the harassing supervisor often lies at the very heart of this misconduct.

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[29](...continued)
1977)("the power inherent in a position of authority is necessarily coercive . . . every sexual advance made by a supervisor would be made under the apparent cloak of that authority. Any subordinate knows that the boss is the boss whether a file folder or a dinner is at issue").

[30] Harassment is often facilitated as well by the fact that the supervisor, rather than the subordinate, controls whether the subordinate must remain in the supervisor's presence when the harassment is occurring.

[31] Barbara Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* (1992), foreword by Hon. Alex Kozinski ("every woman . . . who has spent a substantial amount of time in the work force in the last two decades can tell at least one story about being the object of sexual harassment."); Barbara Gutek, *Sex and the Workplace* 62 (1985)(half of all incidents of harassment reported by women involved supervisors).

A "*hostile* work environment" is by definition an environment the victim would avoid if able to do so; "*unwelcome* sexual advances" are by definition advances the victim would prefer to end. Such sexual harassment can only continue if something is preventing or deterring the victim from effectively resisting or correcting those abuses. Often it is the agency powers of a harassing supervisor which disenables the victim from doing so. Recent studies,[32] as well as court cases,[33] demonstrate that

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[32] *See*, Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. Applied Soc. Psychology 877, 895-96 (1997)(most working women who complained to employers about sexual harassment reported that their complaint made things worse); Judith I. Avner, *Sexual Harassment: Building a Consensus for Change*, Kan. J.L. & Pub Pol'y 57, 73 (Spring 1994)(of 84 respondents amongst 300 women filing sexual harassment complaints with the N.Y. State Division of Human Rights, 54 per cent resigned and 41 per cent were terminated after complaining); Louise F. Fitzgerald, *Violence Against Women in the Workplace*, Am. Psychologist, 1070, 1072 (1993) (50 per cent of women who filed a complaint in California were fired; another 25 per cent resigned due to stresses of the complaint process or the harassment itself); *see also* Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. Soc. Issues, 117, 122-23 (1995)(most common reason why victims don't complain is fear of retaliation; e.g., 1992 study of Navy found that one third of sexual harassment victims were humiliated in front of others when they complained).

[33] *See, e.g. Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863 (7th Cir. 1995)(affirming judgment for air freight clerk placed on unpaid maternity leave after complaining about supervisor's sexual harassment, for which she had gotten a "misrepresentation of facts" writeup); *Daniels v. Leoveridge*, 32 F.3d 1472 (10th Cir. 1994)(affirming judgment for plaintiff fired four days after complaining to foreman about supervisor's sexual harassment);

(continued...)

complaints of sexual harassment can yield grief perhaps even more often than relief. Against that body of experience, it is entirely understandable that large numbers of harassment victims do not file internal complaints. Title VII should not be construed to limit access to judicial relief to harassment victims willing to sacrifice or imperil their jobs.[34]

The implicit or even explicit threat of a supervisor's displeasure or retaliation would be of far less consequence if the supervisor and subordinate alike knew with certainty that the subordinate had available to her the means to thwart any adverse actions which the supervisor might seek to take. A supervisor could not impose his presence and offensive conduct on a subordinate unable to flee his presence if the supervisor and subordinate knew that she could bring about his prompt dismissal for any such advances. In either situation, despite his usual

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[33](...continued)
Davis v. Tri-State Mack Distributors, Inc., 981 F.2d 340 (8th Cir. 1982)(affirming judgment for secretary whose harassing supervisor "nitpicked" her work after she complained while company imposed additional requirements for her taking medical leave and accused her falsely of rudeness to customers and unauthorized absences); *Cortes v. Maxus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992) (affirming constructive-discharge verdict for drafting technician who was reassigned to supervisor who made repeated lewd advances and frequently touched her inappropriately, and who docked her pay for the day that she spent at manager's office complaining about him).

[34] It is the risk of such retaliation, indeed, that keeps many women — as several of the women lifeguards in this case testified was the case with them — from filing either internal complaints or Title VII charges until after they have resigned or been fired. *See* Susan Estrich, *Sex at Work*, 3 Stan. L. Rev. 813, 847-53 (1991)(courts tend to ignore the fact that women who complain are likely to face retaliation).

supervisory authority over ordinary employment matters, the supervisor could not effectively wield those powers to facilitate harassment of the subordinate. In the instant case, for example, if Beth Ann Faragher had been the daughter of the mayor of Boca Raton, Terry and Silverman, although able to control such things as the beach to which she was assigned, clearly could not have relied on their supervisory powers, or a threat of the abuse thereof, to sexually harass her. The first instance of such an abuse of supervisory powers would have had clearly foreseeable disastrous consequences for the perpetrators. Few employees, however, are in the happy position of enjoying the immunity from supervisory abuse that is a prerequisite of being the boss' daughter.

In the case at bar, Respondent is liable for Chief Terry and Lieutenant Silverman's sexual harassment of Petitioner because the City imbued them not only with authority over the everyday details of lifeguards' jobs, but also with power to deter resistance or complaints. That power derived from their abilities to make hiring recommendations, to effect pay raises through personnel evaluations, to obtain undated resignation letters, and to banish complainants to undesirable towers or unwanted shifts. Viewing Terry and Silverman's behavior through that prism, one reasonably could conclude that while Respondent may not have commanded Terry and Silverman, or even openly licensed them, to "Go sexually harass women lifeguards," the City delegated to them authority that they could — and did — wield to harass subordinates in a way that they could not have done if the women had not worked for the City.

Chief Terry ran the City's beach as if it were his own — and Respondent allowed him to do so. Most of the women lifeguards were part-time employees with no civil

service protection (which mirrors most of the nation's employees' at-will status). Terry's ability to visit revenge upon any who crossed him was legendary. City Hall had not clearly communicated zero-tolerance of sexual harassment.

In such an atmosphere, sexual harassment was the rule, not the exception. The atmosphere was one of unbridled licentiousness and petty, workaday tyranny — a culture in which Lieutenant David Silverman dared to pantomime cunnilingus in front of Marine Safety headquarters, in which others watched a complaining lifeguard trudge off to a distant tower with no sun protection, and in which Captain Gordon cautioned women against complaining. A reasonable conclusion that Chief Terry and Lieutenant Silverman could get away with behaving as they did, based on their actually having gotten away with it for so long, was all the more induced by the absence of any effective procedure by which Petitioner and the other women could know that they could fight back. The same laxness that the City displayed towards sexual harassment both made Petitioner and the other women fearful of complaining *and* at the same time emboldened Chief Terry and Lieutenant Silverman to behave as they did.

II. RESPONDENT HAD KNOWLEDGE, BOTH ACTUAL AND CONSTRUCTIVE, OF TERRY AND SILVERMAN'S SEXUAL HARASSMENT OF PETITIONER.

A. Gordon's (and the City's) Actual Knowledge

The identification of individuals whose knowledge *is* knowledge of their employers is governed by principles of agency. The well-established rule is that an employer is

charged with "knowledge of an agent concerning a matter as to which . . . it is his duty to give the principal information." Restatement (Second) of Agency § 272.[35] This rule applies to knowledge on the part of any employee, supervisor or subordinate, of whatever rank or station, who has a duty to disclose the information to the employer. City officials expressly conceded that Gordon was under just such a duty.

The facts here are not in dispute. Robert (Flash) Gordon, a lifeguard lieutenant and later a captain — whom Bender, the City's personnel manager, testified had a duty to report sexual harassment, or any inappropriate behavior, up the chain of command — displayed a neglectful nonchalance to complaints of one woman lifeguard after another. Captain Gordon's response was to claim impotence on the grounds that "the City doesn't care." What Respondent cannot say, however, is that the City did not know — for Captain Gordon's knowledge *is* the City's knowledge.

The Court of Appeals for the Eleventh Circuit, however, dismissed Gordon's undisputed actual knowledge as irrelevant because "he did not rank as higher management in the City." App. 15a.[36] Nothing in

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[35] Similarly, § 275 of the Restatement provides that "[t]he principal is affected by the knowledge which an agent has a duty to disclose to the principal...."

[36] The District court concluded that Gordon was an agent who "knew of the lifeguards' discomfort with Terry's and Silverman's conduct but failed to report the complaints brought to him either to Terry or to the City's management," concluding that "[t]his knowledge on the part of the City's agent, and the agent's inaction, provides a further basis for imputing liability to the City."

(continued...)

agency law, however, requires notice only to "higher management"; the most that is required is that the knowledge be on the part of someone with an obligation to act on that knowledge. Courts considering such questions have attributed knowledge to companies based on the knowledge of relatively low level employees.[37] The post-*Meritor* EEOC Policy Guidance, meanwhile, treats knowledge of any "supervisor"[38] (other than a perpetrator)[39] as sufficient.

The court of appeals also dismissed Captain Gordon's failure to report the information he received from the women lifeguards because "Gordon did not receive that information as the City's agent; he received it as a friend held in high repute by his colleagues." App.15a, n. 9. What led Faragher and other women lifeguards to speak with Gordon, however, is irrelevant under agency

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[36](...continued)
App. 93a. The District court so held even in the face of its specific statement that Terry, Silverman and Gordon were not "higher management." App. 71a, ¶7.

[37] The Restatement cites as examples employees who sell a horse, do a title search, or manage rental property. Restatement (Second) of Agency § 272, cmt c. *See also id.* cmt. d (railroad conductor).

[38] *See, e.g., Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1320-21 (8th Cir 1994) (liability imposed on employer because managers from several states present at party where offensive videotape was shown).

[39] Under established agency principles knowledge by a supervisor of *his own* harassing activities does not constitute knowledge by the employer where, as is ordinarily the case, that harassment is unauthorized. Restatement (Second) of Agency §§ 271, 280, 496 (1958).

principles; "[e]xcept for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by a servant or other agency is immaterial in determining the liability of his principal because of it,"[40] "since the mind of the agent cannot be divided into compartments, the principal should be bound by whatever knowledge the agent has, irrespective of its source or time of acquisition . . . ."[41]

Gordon was "someone who (a) has under the terms of his employment, or (b) is reasonably believed to have, or (c) is reasonably charged by law with having a duty to pass on the information to someone within the company who has the power to do something about it." *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997)(reversing summary judgment against plaintiff who complained to her department head about harassment by her foreman) (citing *Torres v. Pisano*, 116 F.3d 625, 636-38 (2nd Cir. 1997).)[42]

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[40] Restatement (Second) of Agency § 276. Unlike in *Torres v. Pisano*, 116 F.3d 625 (2nd Cir. 1997), "a situation in which an intimidated and embarrassed employee was finally able to gather the strength to complain about the harassment that she had been enduring, but specifically asked the supervisor to whom she complained to keep the matter confidential and to refrain from taking action until a later date," there is no evidence in this record that Faragher or anyone else asked Gordon to keep quiet about their complaints.

[41] Restatement (Second) of Agency § 276, cmt. a.

[42] An analogy illustrates the flaw in the *en banc* majority's logic: if Faragher had told Gordon at an off-duty party that Terry and Silverman were stealing cash from beach patrons, Gordon surely would have been disciplined for not passing on that information. No logical distinction can be made between theft on

(continued...)

As pointed out by one of the dissents below, not only does Gordon's knowledge of the complaints support a theory of direct liability for the acts of Terry and Gordon, but Gordon's response to the women lifeguard's complaints — i.e., that the City did not care — is "evidence of the City's lack of concern [that] also supports the district court's finding of constructive notice." App. 39a, (Anderson, J., dissenting).

B. Constructive Knowledge, Based on Pervasiveness

This Court in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), quoting *Meritor*, held that Title VII is violated by hostile environment sexual harassment "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' 477 U.S. at 65, that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' *id.*, at 67. . ." 114 S.Ct. at 370. In the case at bar, the district court, after recounting multiple incidents of sexually inappropriate behavior by Chief Terry and Lieutenant Silverman, found "Terry's and Silverman's conduct sufficiently severe or pervasive to alter the conditions of Faragher's employment and create an abusive working environment." App. 92a. The court went on to hold: "[T]his finding of pervasiveness supports an inference of knowledge, or constructive knowledge, on the part of the City regarding Terry's and Silverman's sexual harassment, making the City indirectly liable for such conduct." *Id.*

The District court's finding is consistent not only with

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[42](...continued)
one hand and sexual harassment on the other.

common sense, but also with the EEOC's working model of sexual harassment enforcement[43] and the experience of the courts.[44] The district court's attribution of constructive knowledge to the Respondent also is consistent with the record in this action, which supports findings of such pervasiveness of sexual harassment as to give rise to constructive knowledge. Under Federal Rule of Civil Procedure 52(a), such a factual finding can only be overturned if "clearly erroneous." *Pullman-Standard, Inc. v. Swint*, 456 U.S. 273 (1982) (determination of racially discriminatory intent an issue of fact on which district court may not be reversed absent clear error). "[F]actfinding is the basic responsibility of district courts, rather than appellate courts . . . ." *DeMarco v. United States*, 415 U.S. 449, 450 (1974). In *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (reinstating district court's determination that city had discriminated on basis of sex in hiring recreation director), this Court noted that the clearly-erroneous standard "plainly does not entitle a

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[43] "Ways by which . . . constructive knowledge could be demonstrated include by the pervasiveness of the harassment." Equal Employment Opportunity Commission Policy Guidance on Sexual Harassment, Fair Employment Practices Manual (BNA), at 405:6695. "Employers usually will be deemed to know of sexual harassment that is openly practiced in the workplace or well-known among employees." *Id.* at 405:6696.

[44] *See, e.g. Jansen*, 123 F.3d at 511 (Posner, C.J., concurring)(employer "ought to take steps to correct the problem" if, *inter alia*, "the harassment is so pervasive (considering its nature, frequency, and the number of victims and perpetrators) that the employer knows or should know about the harassment"); *Carr v. Allison Gas Turbine Div. Gen. Motors*, 32 F.3d 1007, 1009 (7th Cir. 1994)("the greater the harassment — the more protracted or egregious, as distinct from isolated . . . or ambiguous, it is — the likelier is the employer to know about it or to be blameworthy for failing to discover it").

reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." 470 U.S. at 573.

Here, however, the court of appeals disregarded the district court's finding on what plainly was a factual issue, i.e., just how pervasive was the sexually harassing behavior going on at the beach. In the circumstances of this case, the court of appeals could not conclude, within the strictures of Rule 52(a), that the district court's finding regarding pervasiveness was clearly erroneous. The undisputed facts in this case reveal a four-year pattern of systemic harassment by two perpetrators against at least eight different women.[45] One of the dissents correctly noted that "[t]he determination of constructive notice is based on factual findings which this court will not overturn unless they are clearly erroneous." App. 21a (Barkett, J., dissenting), and observed that, "[n]onetheless, the majority essentially engages in *de novo* review, substituting the trier of fact's assessment of the record with its own." *Id.*

C. Constructive Notice Based on the Absence of an Effective Policing Mechanism

To the extent that City officials did not know that Terry and Silverman were harassing Petitioner and the other women lifeguards within the Marine Safety Section, that is because the City virtually sought ignorance. Although the City promulgated a "policy" in 1986, the City's personnel director was unclear as to whom or how

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[45] They were Faragher, Ewanchew, Harrington, Bonner, Barta, Nye, Evans and Leen.

it ever was distributed. The district court found there had been a "complete failure on the part of the City to disseminate its written sexual harassment policy among Marine Safety Section employees," App. 94a. Further, the policy was palpably deficient in at least three respects: (1) it failed to tell employees how or to whom to complain if they experienced sexual harassment; (2) it imposed on no employee — witness or supervisor — an express duty to report sexual harassment;[46] and (3) it contained no assurances for either victims or witnesses of confidentiality or non-retaliation.

Traditional agency principles require an employer to exercise reasonable care to learn of and prevent injuries to its employees.[47] Courts[48] and academicians[49] alike have

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[46] *See Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 946 (1997) ("a procedure that does not require a supervisor who has knowledge of an incident of sexual harassment to report that information to those who are in a position to take appropriate action falls short of that which might absolve an employer of liability"); *Jansen*, 123 F.3d at 511, 513 (Posner, C.J., concurring)(effective anti-harssment policy must include anti-retaliation measures); *see also Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987)("[t]hough the intent was commendable," the company's policy failed because "not only was it vague on paper, it was vague and ad hoc in its implementation and did not function effectively to eliminate harassment . . . .")

[47] "A master is subject to a duty that care be used . . . to provide working conditions which are reasonably safe for his servants and subservants. . . ." Restatement (Second) of Agency § 492. That duty of care requires an employer to consider the risk that injury may be inflicted on employees due to the negligence or misconduct of other employees. *See id.* § 493 & cmt. b.

[48] *See, e.g., Jansen*, 123 F.3d at 496-497, n. 3 ("as Judge Easterbrook pointed out in oral argument, statistically

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perceived that sexual harassment is a persistent and entirely foreseeable problem — especially for women, such as Faragher and the other women lifeguards here, holding traditionally male jobs.[50] This recognition

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[49](...continued)
speaking, every employer should anticipate harassment"); 123 F.3d at 511 (Posner, C.J., concurring)("Everyone knows by now that sexual harassment is a common problem in the American workplace . . .").

[49] *See, e.g.*, Deborah L. Rhode, *Speaking of Sex* 99 (1997) (more than half of all women experience sexual harassment during their academic or working lives); Barbara Gutek, *Sex and the Workplace*, 46 (1985) (53 per cent of all women had experienced sexual harassment on the job); Anne Scott Tyson, *U.S. Companies Move to Curb Sexual Harassment on Job*, Christian Science Monitor, May 30, 1996 (sex discrimination complaints of which were up 165 per cent since 1990, comprised 30.7 per cent of Equal Employment Opportunity Commission's caseload); U.S. Merit System Protection Board, *Sexual Harassment in the Federal Workplace* 20 (1995)(two-thirds of 400 women surveyed in 1993 largest service and industrial firms reported experiencing sexual harassment within the last year); Barbara Gutek, *Understanding Sexual Harassment at Work*, 6 Notre Dame J. of Law, Ethics & Pub. Pol., 335, 344-45 (1992)(studies revealing that 33-66 per cent of women reported being harassed within the previous year or two; 88 per cent of women in one survey reported having been harassed at some prior point in time).

[50] *See Carr v. Allison Gas Turbine Div., General Motors*, 32 F.3d 1007, 1012 (7th Cir. 1994); *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010, 1012 (8th Cir. 1988); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991); *see also* Deborah L. Rhode, *Speaking of Sex* 101-02 (1997) (women who experience harassment in male-dominated workplaces often are seen as inviting the abuse, or oversensitive because abusive language and pornography are "a natural thing" in "a man's world"); Matthew S. Hesson-McInnis & Louise F. Fitzgerald, *Sexual Harassment: A Preliminary Test of an Integrative Model*, 27 J. Applied Soc.
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militates for imposition of liability on an employer who fails to take reasonable steps to guard against the known danger of sexual harassment in the workplace. Such reasonable care should, at minimum, include a vigorous prevention program[51] and an effective enforcement

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[50](...continued)
Psychology 877, 897 (1997); Anne Scott Tyson, *US Companies Move to Curb Sexual Harassment on Job*, Christian Science Monitor, May 30, 1996 (sexual harassment is worst in male-dominated industries; citing 1992 Chicago study that 83 per cent of tradeswomen had experienced sexual harassment); U.S. Merit System Protection Board *Sexual Harassment in the Federal Workplace* ix, 17 (1995) (employees who "work exclusively or mostly with people of the opposite sex and [who are] supervised by members of the opposite sex" are more likely to experience sexual harassment); Ronni Sandroff, *Sexual Harassment Survey Results*, Working Woman, June 1992 (harassment becomes much more common when women enter predominantly male workplaces).

[51] The EEOC — following this Court's demonstration of a clear lack of enthusiasm in *Meritor* for generalized policies that do "not address sexual harassment in particular, and thus [do] not alert employees to their employer's interest in correcting that form of discrimination" and do not "encourage victims of harassment to come forward," 477 U.S. at 72-73 — has provided specific guidance regarding essential elements of an efficacious anti-harassment program:

> [A]n effective preventative program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. . . . It should ensure
(continued...)

mechanism.[52]

The danger of requiring less is illustrated by the arguments in one of the dissents below:

> [A]n employer reading the court's opinion may conclude that it, like the City of Boca Raton, can escape Title VII liability by having a policy against sexual harassment but concealing from its employees the identity of the person to whom claims are to be made. Because such concealment would have the potential for reducing claims of sexual harassment,

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[51](...continued)
confidentially as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance on Sexual Harassment, 8 Fair Employment Practices Manual (BNA), at 405:6699 (March 19, 1990).

[52] The EEOC policy guidance calls for an enforcement mechanism that would function as follows:

> When an employer receives a complaint or otherwise learns of sexual harassment in the workplace, the employer should investigate promptly and throughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. . . . The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

Id. at 405:6700.

> and thus the cost of doing business, an employer might choose to follow the City's footsteps. The employer's other alternative, of course, would be to identify the person to whom complaints are to be made and to have an efficient mechanism for investigating them and taking curative measures when necessary. No system is perfect, however. Thus, an employer with a model system in place cannot render itself immune from claims. In weighing the costs of the two alternatives, an employer may opt for the course the City took in this case. That course may yield more sexual harassment but less liability, and thereby dilute the employer's Title VII duty.

App. 36a, Tjoflat, J., dissenting.

In the case at bar, Respondent's failure to effectively promulgate and enforce a sexual harassment policy during the late 1980s gave rise to constructive knowledge of the sexually harassing behavior.

CONCLUSION

For the above reasons, the decision of the Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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